the brakesman and section-master should not have been examined as witnesses, and their declarations, not being made at such time and under such circumstances as to make them a part of the *res gestæ*, were mere hearsay.

It is argued, however, that the evidence, if excluded, would not have changed the verdict of the jury, as the case was clearly made out without it. It is impossible for this court to estimate the effect which this evidence had on the minds of the jury, and it would be going beyond our legitimate function to enter upon any such vain speculation.

The court erred in admitting the evidence, and it is our province, without speculating how the evidence might have affected the minds of the jury, simply to declare it inadmissible, and, for this error of the court, to reverse the judgment, and to remand the cause to the said Circuit Court, for a new trial, to be had there in accordance with the principles declared in the foregoing opinion.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

SUPREME COURT OF KANSAS.[2]

COURT OF ERRORS AND APPEALS OF MARYLAND.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

ACTION. See *Contract; Fraud.*

Successive Suits for accruing Damages.—For malpractice by a physician in setting a broken arm, successive suits cannot be brought from time to time, as damages in the future may be suffered, but the recovery is once for all, and may embrace prospective as well as accrued damages: *Howell* v. *Goodrich*, 69 Ill.

AGENT.

What is necessary to make the act of an Agent done without authority binding upon his Principal.—To make the act of an agent, done without the authority of his principal, binding upon the latter, it is necessary to show that he subsequently ratified and adopted the act; and to make such ratification and adoption effectual as against the principal, it must be shown that he had previous knowledge of all the material facts; and if he assented while ignorant of those facts, he is at liberty to disaffirm the transaction when informed of them: *Bannon* v. *Warfield*, 42 Md.

Where an agent lends the money of his principal upon a security which proves to be insufficient, the judgment of such agent as to the value of the security at the time it was taken is not conclusive; evidence may be introduced, as reflecting on the question of the want of good faith and reasonable care in making the loan and taking the security, to show

[1] From Hon. N. L. Freeman, Reporter; to appear in 69 Illinois Reports.

[2] From Hon. W. C. Webb, Reporter; to appear in 15 Kansas Reports.

[3] From J. Shaaf Stockett, Esq., Reporter; to appear in 42 Maryland Rep.

[4] From P. Frazer Smith, Esq., Reporter; to appear in 78 Pa. State Reports.

that the value of the security was very much less than the estimate placed thereon by the agent: *Id.*

Proof of Authority.—While it is competent to prove a parole agency and its nature and scope by the testimony of the person who claims to be the agent, and to prove any parol authority by the testimony of the person who claims to possess such authority; yet it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time; nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person, who, it is claimed, had obtained such authority: *Howe Machine Co.* v. *Clark*, 15 Kans.

ATTORNEY.

Costs and Expense growing out of his Wrongful Act.—Where an attorney, employed to transact certain business for his client, procures a third person to be invested with the legal title to property belonging to his client without any consideration being paid therefor, and the arrangement serving no beneficial purpose to his client, and he afterwards incurs expense in costs and attorney's fees in getting the legal title in himself instead of his client, he will have no legal claim to be reimbursed or allowed for such expenses, on bill for an account by his client against him: *Hughes* v. *Zeigler*, 69 Ill.

AUCTION. See *Title.*

BAILMENT.

Pledge—A security for whole Debt and every part of it.—In all cases a pledge is understood to be a security for the whole and for every part of the debt or engagement, unless it is otherwise stipulated between the parties. If several things are pledged, each is deemed liable for the whole debt or other engagement, and the pledgee may proceed to sell them, from time to time, until the debt or other claim is completely discharged. If anything perishes by accident or casualty, without his fault, he has a right over the residue for his whole debt or other duty: *Baldwin* v. *Bradley*, 69 Ills.

COMMON CARRIER.

When Liability of ceases, and that of Warehouseman attaches.—Where goods have reached their destination either in the night time or on a Sunday, or where, for any other reason, the consignee is not ready to receive them on their arrival, and the carrier puts them in store, or in the charge of competent and careful servants, ready to be delivered when called for, the carrier's liability as insurer ceases, and he will thereafter be liable only as warehouseman, and if the goods are destroyed by fire without fault on his part, he will not be responsible: *Rothschild* v. *Mich. Central Railroad Co.*, 69 Ill.

CONSTITUTIONAL LAW. See *Evidence.*

Local Option Laws—Delegation of Legislative Power—Nature of a License to sell Liquor.—Section 1 of the Act of 1874, ch. 453, provided for an election to be held on the second Tuesday in July 1874,

at which the voters of the several election districts in the counties named, should cast ballots "for the sale of spirituous or fermented liquors," or "against the sale of spirituous or fermented liquors;" and directed the judges of election should make return of the votes to the judges of the Circuit Court, who should make proclamation of the result. Section 2 enacted that if it should be found by the returns of the judges of election, and proclamation of the judges of the Circuit Court, that a majority of the votes, in any district of either of the said counties, * * * had been cast against the sale of spirituous or fermented liquors, that then it should not be lawful for any person or persons, or body corporate, to sell spirituous or fermented liquors, in any district of either of said counties voting by a majority against selling the same. Section 3 prescribed the penalty for a violation of the act; and section 4 provided that the act should take effect immediately after it should have been determined by a majority of the people in any one or more election districts of the counties named, whether or not spirituous or fermented liquors should not be sold, as before provided for: *Held*, that this act was constitutional and valid; its going into effect and becoming operative, being made to depend upon the result of a popular vote, was not a delegation of legislative power to the people: *Fell* v. *The State*, 42 Md.

The legislature has the undoubted power to prohibit the sale of spirituous or fermented liquors in any part of the state, notwithstanding a party to be affected by the law may have procured a license, under the general license laws of the state, which has not yet expired. Such a license is in no sense a contract made by the state with the party holding the license. It is a mere permit, subject to be modified or annulled at the pleasure of the legislature, who have the power to change or repeal the law under which the license was granted: *Id.*

CONTEMPT. See *Witness.*

CONTRACT.

Action—Mutual Mistake—Rescission.—Government bonds were deposited in a bank; the depositor alleged that the bank bought them from him at par, fraudulently informing him that there was no premium on them, when there was, within the knowledge of the bank. The depositor sued the bank for the premium and declared in the common money counts: *Held*, that the depositor could not recover on those counts: *Sankey's Executors* v. *First Nat. Bank of Mifflinburg*, 78 Pa.

If the bonds were purchased by the bank in good faith at par, although they were then selling in the market at a premium, of which both parties were ignorant, the depositor could not, on the ground of mutual mistake, recover the bonds or the premium on them: *Id.*

The mistake or ignorance of the parties as to the premium was not of the essence of the contract, and did not avoid the sale: *Id.*

Rescission—Contagious Disease.—D. leased to M. for one year all the arable land on the farm on which D. then resided. D., on his part, was to furnish everything and board M. for the year at his house. M., on his part, was to perform all the labor in raising the crops on said land. D. was then to have two-thirds of each crop raised on said land and M. one-third thereof. At the time said lease was entered into, and subse-

quently thereto, M. was "infected with a loathsome, contagious and infectious disease, to wit, syphilis," which disease afterwards, and at the time M. boarded at the house of D., endangered the lives and health of D. and his family, &c.; of which disease D. was at the time he entered into said lease ignorant. In ten days after the lease was entered into, and when D. became aware of said disease, he refused to board M. any longer at his house. M. then left the premises and sued D. for damages, claiming (at least on the trial) as damages the value of the use of said land for one year and the value of his board for one year. D., as a defence to said action, offered to show (both by his pleadings and evidence) that M. was affected with said disease; that he, D., was ignorant of the same at the time he entered into said lease; and that he refused to board M. at his house because of said disease, but the court excluded said defence: *Held*, that this was error: *Douglas* v. *McFadin*, 15 Kans.

DAMAGES. See *Action.*

DEED.

Construction—Parol Evidence to explain a Written Instrument.—On appeal from a decree reforming a deed on the ground of mistake, the true construction of the deed is before the court, as well as the sufficiency of the proof of the mistake: *Fryer* v. *Patrick*, 42 Md.

M. and wife mortgaged to P. a lot and buildings, &c., "and also all the household and kitchen furniture in the dwelling on said lot, subject however to the claim of F. *thereupon* for the unpaid purchase-money for the portion of said furniture now being delivered." The construction of this clause being in question upon the contention of F. that all the furniture in the house was subject to this claim, it was *held*, that the extent of F.'s claim could not be definitely ascertained from this clause, and extrinsic evidence might be admitted to show what it was: *Id.*

EVIDENCE. See *Agent; Deed.*

Power of Legislature over Rules of.—While a legislature may not, by the mere machinery of rules of evidence, override and set at naught the restrictions of the constitution, or arbitrarily make conclusive evidence of a fact anything which in the nature of things has no connection with that fact nor reasonably tends to prove it, yet it may make that which, according to the ordinary rules of experience, reasonably tends to prove a fact, conclusive evidence of it: *State* v. *Woodford*, 15 Kans.

EQUITY. See *Highway; Municipal Corporations.*

Trusts—Unexecuted Contracts.—A court of equity will execute a trust where there is a valuable consideration; but if it be voluntary the legal estate must be put out of the settlor; the question as to its validity being whether it was at first perfectly created: *Carhart's Appeal*, 78 Pa.

In general, a court of equity will not enforce unexecuted voluntary contracts *inter vivos*, but will leave parties to their remedies at law: *Id.*

The simple avowal by a purchaser at sheriff's sale, whether made at the time of the purchase or afterward, that the purchase was for another, will not support the allegation of a trust: *Id.*

Power signed a paper stating that if he purchased lands about to be

sold by the sheriff, he would hold them on specified trusts for creditors of the defendant in the execution; after his purchase of the land, *Held*, under the circumstances of the case, not to create a trust in Power: *Id.*

Decreeing Cancellation and Delivering of Instruments.—A chancellor will not always order an instrument to be delivered up to be cancelled when he would refuse specific performance of the contract; he will leave the parties to their legal remedies: *Stewart's Appeal*, 78 Pa.

To decree an instrument to be delivered up to be cancelled is a matter in the sound discretion of the court, and the power should not be exercised except in a very clear case: *Id.*

Whenever an instrument exists, which may be vexatiously or injuriously used against a party, after the evidence to impeach it has been lost, or which may throw a cloud over the title, and he cannot immediately protect his right by any proceedings at law, equity will afford relief by directing the instrument to be delivered up to be cancelled, or such other decree as justice or the rights of the party may require: *Id.*

EXECUTION. See *Trespass.*

FORMER ADJUDICATION. See *Action.*

FRAUD. See *Limitations, Statute of.*

Account—Bill of Review—Settlement between Guardian and Ward.—Where an account is asked on the ground of fraud, it is not sufficient to charge fraud in general terms; particular acts of fraud should be stated: *Marr's Appeal*, 78 Pa.

Fraud without damage is no ground for relief at law or in equity: *Id.*

Fraud used in obtaining a decree, being the principal point in issue, must be established by proof before the propriety of the decree can be investigated: *Id.*

A bill of review is never sustained on strict law against equity: *Id.*

A guardian may within a reasonable time be called to file and settle his account, although he may have made a settlement with the ward on his arrival at age: *Id.*

After a ward has arrived at full age, he may waive his legal rights to an account and join his guardian in asking for his discharge; and the court has power to grant it: *Id.*

Where there was a settlement with the ward, and a release to the guardian after she came of age, and on the joint application of the ward and her guardian a decree made discharging the guardian, the decree could not be vacated without proof of some specific act of fraud in obtaining it, or of some injury occasioned by it: *Id.*

Action cannot arise from Contract where Plaintiff depends on Fraud.—Fisher sold a house to Saylor, agreeing to make good any loss of Saylor in a resale. Saylor sold for less than he gave. In an action against Fisher for the difference there was evidence that the sale of Saylor was collusive and fraudulent. In answer to a point the court charged, if there was any collusion between Saylor and his vendee in the sale, then Saylor "cannot recover more than the difference between a fair price for the house and the amount paid to Fisher:" *Held* to be error; the

fraud would prevent Saylor from maintaining the action: *Fisher* v. *Saylor*, 78 Pa.

Although there were no fraud in the original contract, the foundation of Saylor's right of action, yet, as the sale by him was a condition precedent, he was bound to sell in good faith, and if the sale was collusive, it was fraudulent as to Fisher; it was as if there had been no sale, and there was no right of action: *Id.*

If the sale had been honestly made, although for less than the market value, Saylor could recover the difference between a fair value and the price paid Fisher: *Id.*

A right of action cannot arise out of a fraudulent contract, nor out of the fraudulent performance of a condition of the contract: *Id.*

Frauds, Statute of.

Parol Promise—Debt of Agent.—Where K. & W, by a parol agreement with a certain bank, promise that if the bank will cash a certain draft to be drawn by and in the name of a certain agent of theirs upon S. L. & Co., that said K. & W will be responsible for its payment, and afterwards such agent does draw such draft and the said bank cashes the same, and afterwards said draft is dishonored by said S. L. & Co.: *Held*, that the bank may maintain an action to recover from said K. & W., on said parol promise, the amount paid out on said draft, with interest: *Kohn and Weil* v. *First National Bank of Fort Scott*, 15 Kans.

Guardian. See *Fraud.*

Highway.

Encroachment on—Injunction—Equity Practice.—The Act of April 28th 1870, fixing and widening the line of Chestnut street, provided that it should "not interfere with any buildings now erected on the south side of that street;" the front of a building was taken down and a new front erected on the line prescribed by the act; ornamental columns, pilasters, &c., to the front were extended fifteen inches beyond the line: *Held*, that these were not prohibited by the act: *City of Philadelphia's Appeal*, 78 Pa.

According to the ordinary course of equity practice, when a case is heard on bill and answer, the allegations of fact in the answer are admitted: *Id.*

In a bill for injunction, if the question is doubtful, it is decisive against the injunction; chancery will not decree an injunction except in a clear case of the invasion of a public or private right: *Id.*

No usage, however long continued, will justify an encroachment upon a highway; but such encroachment, to be remedied by injunction, must be really an obstruction to the free use of the highway: *Id.*

Husband and Wife.

Validity of Agreements between—Standard of Proof in such cases—Burden of Proof—Invalid Gift from Husband to Wife.—Where articles of household furniture were purchased by a husband in pursuance of an antecedent agreement with his wife, that he should advance the money, and she would reimburse him, which she afterwards did, it was *Held*: 1st. That agreements of this kind between husband and wife,

when the latter has a separate estate, are valid and binding upon both parties; and if *bonâ fide*, and consummated, the property purchased by such agency becomes the goods of the wife. 2d. That no higher standard of proof of such agreements is required than in other civil cases; a preponderance of evidence being all that is necessary. 3d. That in an action by the wife to recover damages for the illegal seizure and sale of said articles of furniture, under an execution against her husband, the burden of proof was on her to show that they were her separate property when so seized and sold: *Myers et al.* v. *King*, 42 Md.

A gift from a husband, who is insolvent, to his wife, is in prejudice of the rights of his subsisting creditors, and the wife can acquire no valid title to the same: *Id.*

INFANT. See *Misnomer.*

JUSTICE OF THE PEACE. See *Trespass.*

LIMITATIONS, STATUTE OF.

Actions on ground of Fraud—What is included under—Pleading.—Sect. 18 of the code, which provides, among other things, that "an action for relief on the ground of fraud," can only be brought within two years after the cause of action shall have accrued, and that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud," applies to actions for damages founded upon fraud, as well as to actions for equitable relief founded upon fraud: *Young* v. *Whittenhall*, 15 Kans.

Where the petition in such a case shows upon its face that the fraud upon which the cause of action is founded was consummated more than two years before the commencement of the action, the plaintiff must further set forth in his petition that he did not discover the fraud until within less than two years before the commencement of the action, or his petition will be held defective on demurrer: *Id.*

LICENSE. See *Constitutional Law.*

LOCAL OPTION. See *Constitutional Law.*

MALICIOUS PROSECUTION.

Special Damages—Must be declared for—The declaration in an action for malicious arrest was general; under it only such general damages as the law presumes would follow from the arrest could be recovered: *Stanfield et al.* v. *Phillips*, 78 Pa.

To recover special damages the declaration should set out with particularity the causes which produced them: *Id.*

Evidence of special damages can be given only where they have been properly averred in the declaration: *Id.*

In an action for malicious arrest, under the Act of July 12th 1842, of the plaintiff, who was a merchant, the court allowed a witness to be asked, "in what manner the plaintiff was injured in credit and circumstances and to what extent:" *Held* to be error: *Id.*

Exemplary or Punitive Damages—Want of Probable Cause.—In an action for malicious prosecution, the plaintiff is entitled to recover, if it appear that the defendant instituted, or caused to be instituted, the

prosecution under which the former was arrested, maliciously and without probable cause, and that said prosecution was terminated by the discharge of the plaintiff before the institution of his action: *McWilliams* v. *Hoban*, 42 Md.

If, in an action for malicious prosecution, the jury find for the plaintiff, they are at liberty to take into consideration all the circumstances of the case, and to award such damages as will not only compensate the plaintiff for the wrong and indignity he has sustained in consequence of the defendant's wrongful act, but may also award exemplary or punitive damages as a punishment to the defendant for such act: *Id*

In an action for malicious prosecution, the court may properly instruct the jury, that if they find that there were no circumstances connected with the transaction out of which the prosecution arose, which would warrant a reasonable, dispassionate man in believing the plaintiff to have been guilty of the charge made against him, and in undertaking such prosecution from public motives, then there was no probable cause for the prosecution, and the jury may infer, in the absence of sufficient proof to satisfy them to the contrary, that such prosecution was malicious in law: *Id.*

Master and Servant.

Liability of Master for injury to Servant—Duty of Master to furnish proper Machinery, &c.—It is the duty of every employer to exercise reasonable care in providing his laborers with safe machinery, suitable tools and appliances, adapted to the uses for which they are designed: *Mullan* v. *Philadelphia and Southern Mail Steamship Co.*, 78 Pa.

Where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities, is a breach of duty for which the master is liable: *Id.*

The risk which a laborer assumes of injury from the neglect of his fellow, is when they are co-operating in the same business, so that he knows that the employment is one of the incidents of their common service: *Id.*

The plaintiff was engaged as a laborer, under a stevedore employed by the ship-owner, in unloading a vessel; the rope by which the load was raised was one that had been spliced by the mate before the arrival of the vessel at port, and was used as a "single fall," which was more liable to part than a "double fall." Whilst raising a cask, the rope parted at the splice, the cask fell and injured the plaintiff. Whether the stevedore was a fellow-workman of the plaintiff, and whether the negligence of the mate in splicing the rope was a risk assumed by the plaintiff, were, under the circumstances, for the jury: *Id.*

It was proper for plaintiff to ask of a witness if, at or immediately after the accident, he heard the stevedore say anything concerning the rope or its insufficiency: *Id.*

Misnomer.

Party served by wrong Name, though an Infant, bound by.—Where the real party in interest and the one intended to be sued is actually served with process in the cause, even though under a wrong name, he

must take advantage of the misnomer by plea in abatement in such suit, and if he does not he will be concluded by the judgment or decree rendered, the same as if he were described by his true name. And this rule applies as well to infant as adult defendants: *Pond* v. *Ennis*, 69.

Municipal Corporation.

Title and control of Streets—Eminent Domain—Interference of Court of Equity.—The corporate authorities of a city hold the public streets in trust for the use of the public. Where the municipality possesses the fee in such streets, although in trust for public uses, it may maintain ejectment against any one who wrongfully intrudes upon, or occupies, or detains the property. Where the adjoining proprietor retains the fee, the right to the possession, use and control of the street by the municipality is regarded as a legal and not a mere equitable right: *City of Chicago* v. *Wright*, 69 Ill.

Equity has no power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace, and from keeping a public street open to public use. The court has no jurisdiction to interfere with the public duties of any of the departments of the government, or override the policy of the state: *Id.*

Where a court of equity, by decree, stayed the hands of the corporate authorities of a city and the police power, to enable a party to take forcible possession of a public street, and provided that after he had closed up the same the city should be forever enjoined from opening or attempting to open the same, for public use, it was *held* to be an unwarrantable attempt to interfere with the exercise of the right of eminent domain, on the part of the city, which was a political question of expediency, and not a judicial one: *Id.*

Negligence. See *Master and Servant.*

Rule as to comparative.—The rule adhered to by this court is, that negligence in the plaintiff which may have contributed to the injury will not prevent a recovery, when it is slight as compared with the negligence of the defendant. An instruction that the jury may find for the plaintiff, unless his negligence was equal to or greater than that of defendant, is not the law, and therefore erroneous: *Illinois Central Railroad Co.* v. *Benton*, 69 Ill

Officer. See *Trespass.*

Partnership.

Liability of Firm for Tort of one Partner.—The rule is, that partners are liable *in solido* for the torts of one, if the tort is committed by him as a partner, and in the course of the partnership business: *Loomis* v. *Barker*, 69 Ill.

Share in Profits, when part of Compensation, does not create.—The fact that a party selling goods, &c., is to receive a portion of the net profits on sales, does not make him a partner with the owner, if they are given merely as a part of his compensation: *Burton* v. *Goodspeed*, 69 Ill.

Separate Issues in Action for Account—Duties of Partners to each other.—In an action brought by one partner against his co-partner for an accounting in which the answer, while admitting the partnership, denies the terms as alleged in the petition, and, as a second defence, claims damages for certain breaches by the plaintiff of the partnership contract, it is not error for the court to submit to one jury the question of the terms and duration of the partnership, then to refer to a referee to state and report the account between the partners, and finally to submit to a second jury the claims for damages: *Carlin* v. *Donegan*, 15 Kans.

A petition in an action by one partner against another, which alleges the partnership, gives a copy of the written contract therefor, alleges that the plaintiff at the outset paid in a certain specified amount, that the partnership was terminated, and that during its existence plaintiff had paid on account of debts and expenses a large sum, and that upon a settlement of the partnership accounts, which the plaintiff had vainly sought, a large sum would be found due the plaintiff, and which shows that the partnership owned a large number of chattels and involved a series of transactions, states a cause of action and must be held good as against any objection that can be raised by demurrer, notwithstanding it does not in terms allege that defendant had possession of any of the partnership property, or that he had any accounts to render: *Id.*

The obligation of one partner to another in the management of the partnership business is the exercise of good faith and of ordinary care and prudence, and if loss happens through the ordinary negligence of a partner, he must bear the loss: *Id.*

Removal of Causes.

Stay of Proceeding during pendency of Motion for—Oath not made by party.—Where an application of the plaintiff is pending in a district court of the state, to remove the action into the United States Circuit Court, and the hearing of the application is set by the court for a particular day in the future, it is error for the court to allow the defendant, before that day arrives, and in the absence of the plaintiff and his attorneys, and without any notice to them, to take judgment against the plaintiff, although, upon the pleadings, the defendant is entitled to just such a judgment as he obtained. But where said application is defective, and ought to be overruled, and is eventually overruled, and where the plaintiff, who is in default for want of a reply, afterwards moves the court to vacate said judgment, but does not offer to file a reply, and makes no such showing as would entitle him to file a reply, and where the judgment is correct upon the pleadings in the absence of a reply, and the court overrules the motion to vacate the judgment: *Held*, that the error of the court in rendering the judgment is now immaterial, and therefore the judgment will not be disturbed: *Cooper* v. *Condon et al.*, 15 Kans.

Where an application, under the Act of Congress of May 2d 1867 (United States at Large 559), is made by the plaintiff, to remove an action from a district court of the state to the United States Circuit Court, and the plaintiff himself does not "make and file" any affidavit, nor is there any reason given why he does not do so, but his attorney and agent makes and files the affidavit to sustain said application, and

states therein that the attorney and agent, and not the plaintiff, "has reason to and does believe" that the plaintiff cannot obtain justice in such state court, &c.: *Held*, that the application is not founded upon a sufficient affidavit. The plaintiff himself should make the affidavit: *Id.*

SALE.

Warranty—Rescission—Fraud—Evidence—Return of the Goods.—The defendant sold plaintiff a horse, warranting it sound, the eyes being then sore: evidence of the condition of the eyes a year afterwards was admissible for the purpose of showing that the disease was not temporary, but permanent: *Freyman* v. *Knecht*, 78 Pa.

Evidence of the condition of the eyes a year after the sale was not admissible *per se* to show that they were diseased at the time of the sale; it should not have been received without evidence to show what was their condition during the intermediate time: *Id.*

The plaintiff, alleging that the warranty had been broken, returned the horse, the defendant refused to receive it, and it was sold as a stray for about the price plaintiff paid: *Held*, that evidence of these facts was admissible: *Id.*

The horse or its value was the property of the plaintiff, and the defendant might show the price for which it was sold as a stray, as evidence of the value at the sale to the plaintiff: *Id.*

If the defendant was guilty of fraud in the sale and warranty of the horse, the plaintiff might rescind, and, on returning or offering to return it, recover back the price paid in case for deceit, or in assumpsit or case for the fraudulent warranty: *Id.*

If there were no fraud the plaintiff could not rescind the contract for breach of warranty and return the horse without defendant's consent: *Id.*

He might sue either in case or assumpsit for breach of warranty, and the measure of damages would be, not the consideration, but the difference between the actual value and the value, if sound, with interest from the sale: *Id.*

Where there is a warranty and no fraud or agreement to return, the vendee cannot rescind the contract after it has been executed; his only remedy is on the warranty: *Id.*

SET-OFF.

Unliquidated Damages.—In this state any cause of action arising from contract, whether it be for a liquidated demand or for unliquidated damages, may constitute a set-off, and be pleaded as such in any action founded upon contract, whether such action be for a liquidated demand or for unliquidated damages: *Stevens* v. *Able*, 15 Kans.

STATUTE.

Use of Word in same sense in Different Statutes.—Whenever a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislation on the same subject-matter, it will be understood as using it in the same sense, unless there be something in the context or the nature of things to indicate that it intended a different meaning thereby: *State* v *Woodford*, 15 Kans.

TITLE.

Personal Property.—Davis deposited a piano for storage with Kirby, who bought and sold second-hand furniture at auction and received goods on storage; Kirby had the piano sold at an auction store; Quinn bought it *bonâ fide* at a fair sale, without knowing who was its owner: *Held*, that Davis could recover the piano from Quinn: *Quinn* v. *Davis*, 78 Pa.

The owner of a chattel cannot, apart from legal process, be divested of his title to it, except through some unlawful or improvident act of his own. The transfer of possession to another without more is not such act: *Id.*

The transfer must be accompanied by something indicating in the custodian a right of property or power of alienation; there must be proof of language or conduct at least equivocal: *Id.*

TRESPASS.

Officer—Execution from Justice of the Peace.—An execution which recites a judgment only against B , and is issued upon a judgment only against B , is no protection to an officer in levying upon the property of A., although it commands him to seize the property of A.: *The Wilton Town Company* v. *Humphrey*, 15 Kans.

If a claim sued on before a justice of the peace is a claim against a corporation, service made upon and defence made by the corporation, and judgment in fact rendered against the corporation, such proceedings will not be vitiated by a mere mis-recitation of the name of the corporation: *Id.*

Great allowance must be made in the proceedings of justices of the peace for their ignorance of legal phraseology and their want of familiarity with the requirements of judicial proceedings, and if from the record can be gathered what the magistrate intended to do and decide, and there is that which, however irregularly and inartificially prepared, can be construed into an expression of that intention, the record will be upheld as a sufficient record of the intended act and decision: *Id.*

TRUSTS. See *Equity*.

WITNESS.

Competency—Agent—Death of Agent—Determination of Competency.—Where a firm through an agent enters into a contract, the person with whom the contract is made, on his suit against the firm for a breach of the contract, is a competent witness, although the agent be dead: Act of 1868, ch. 116; *Spencer* v. *Trafford*, 42 Md.

A firm through its agent L. S. entered into a contract with T., who sued for a breach of the contract. At the trial T., the plaintiff, testified that L. S. was dead. Thereupon the defendant offered to prove by H. S., one of the defendants, that L. S. was a member of the firm and beneficially interested in the contract, for the purpose of impeaching T.'s competency as a witness: Act of 1868, ch. 116. The plaintiff objected on the ground that H. S. was not a competent witness: *Held*, that H. S. was a competent witness to prove that L. S. was a member of the firm: *Id.*

In civil cases, where the question of the competency of a witness is one of fact, the court can refer the question to the jury: *Id.*

Rule falsus in uno, &c.—Province of Jury as to Credibility.—The court below instructed the jury as follows: "If you should be satisfied that any witness in this case has wilfully and corruptly testified falsely, to any material fact, then it is your duty to disregard the whole of the testimony of such witness:" *Held*, that such instruction is erroneous, although supported by the decision made in the case of the *State* v. *Campbell*, 3 Kans. 488, and other cases following that case; also *Held*, that it is the province of the jury to determine the credibility of wit nesses and the weight of their testimony; that where any witness has testified wilfully, corruptly and falsely, to any material fact, it is the province of the jury to determine how much, or whether the whole of his testimony should be disregarded, and that no inflexible rule of law should be interposed between the witness and the jury commanding the jury to take all or to exclude all of his testimony: *Shellenbarger* v. *Nafus*, 15 Kans.

Control of Court over Presence of—Exclusion of Testimony for Misconduct—Rights of Party—Contempt.—Where the court makes an order excluding from the court room during the trial all witnesses except such witness as may at any time be called in for examination, it is the duty of all witnesses to obey such order, and any person violating the order may be punished therefor. But where a witness does violate the order, it is error for the court to exclude his testimony simply because of such violation, over the objections and exceptions of an innocent party to the case who desires to examine the witness: *Davenport* v. *Ogg*, 15 Kans.

The testimony of the witness should be received in such a case and should go to the jury, but the conduct of the witness may also be shown to the jury for the purpose of affecting his credibility: *Id.*

Where there is nothing in the record tending to show that the party desiring to examine the witness participated in the guilt of the witness, it will be presumed by the Supreme Court that such party was innocent: *Id.*

Where the testimony of a witness is excluded because it is supposed that the witness is incompetent, it will be presumed, in the absence of anything to the contrary, by the Supreme Court, if the witness is found to be competent, that the party offering him was prejudiced by the exclusion, although the testimony of the witness may not be set out in the record. The rule seems to be this: Where the court below excludes evidence because the evidence and not the witness is supposed to be incompetent, the record must contain the evidence sought to be introduced, so that the appellate court may see whether it is competent or not; but where the court below excludes the witness because the witness and not his evidence is supposed to be incompetent, then all that is necessary to put in the record is enough to show whether the witness is competent or not: *Id.*

And where the competency of a witness is objected to for any particular reason it will be presumed by the Supreme Court, unless the contrary appears, that no other ground for his exclusion exists; and hence all that is necessary in such a case for the record to contain is enough to show whether the particular reason given for the exclusion is sufficient or not: *Id.*